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Workplace Investigations – Relaxed Disclosure Requirements in 2004

The Fair Credit Reporting Act (FCRA) has been amended eliminating a sensitive and burdensome requirement that employer's notify the alleged wrongdoer when conducting workplace investigations into employee misconduct when using third party (non-employee) investigators.[1] Upon completion of the investigation, a copy of the investigator's report was required to be provided to the individual who was the subject of the investigation. On December 4, 2003, President Bush signed the Fair and Accurate Credit Transactions Act (FACTA) that amends the FCRA concerning notice and disclosure requirements when using outside investigators. After March 31, 2004, an investigation of employee misconduct by a third party is no longer covered by the FCRA. Investigations conducted by in-house staff continue to remain exempt from the disclosure requirements.

Background

In 1996 Congress amended the FCRA expanding the procedural requirement for obtaining and using consumer reports for employment purposes, including hiring, promotion, termination, and reassignment.[2] The Federal Trade Commission (FTC) is responsible for interpreting and enforcing the FCRA. The FTC staff regularly issues opinion letters in response to inquiries from employers.

On April 5, 1999, an opinion letter, commonly known as the Vail letter, from the FTC staff concluded that third-party investigators hired to perform sexual harassment investigations in the workplace are consumer reporting agencies under the FCRA and that reports prepared by investigators are "most likely investigative consumer reports" as defined by the FCRA.[3] An investigative consumer report consists of reports bearing on an applicant's or employee's character, general reputation, personal characteristics, or mode of living, and are obtained through *personal interviews* with the individual's friends, neighbors, or associates.[4] The investigator is considered a "consumer reporting agency" for purposes of coverage under the FCRA, defined as "any person which for monetary fees . . . regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information . . . for the purpose of furnishing consumer reports to third parties . . ."[5]

The issue of employee misconduct addressed in the FTC opinion letter involving sexual harassment logically applies to other third-party investigations of alleged wrongdoing including workplace violence, theft, harassment, and other violations of an employer's policies and regulations. Employers were required to provide disclosure to the alleged wrongdoer prior to beginning the investigation and obtain that individual's written consent prior to the release of the report. If the report resulted in any type of adverse action, the employer was required to provide the individual with a copy of the report in addition to his/her rights prepared by the FTC.[6] Although several federal courts have disagreed with the FTC staff's opinion, many employers have continued to follow as opposed to the risk of non-compliance.[7]

FACTA Legislation

The new legislation excludes from the definition of "consumer report" communications made to public or private employers in connection with an investigation of (1) suspected misconduct relating to employment; and (2) compliance with federal, state or local laws and regulations, the rules of a self-regulatory organization, or any pre-existing written policies of the employer.[8] Thus, an employer may use a third party to investigate and report on employee misconduct without having to notify the alleged wrongdoer or obtaining consent prior to beginning the investigation.

If the subsequent investigation reveals that it is likely that wrongdoing did in fact occur, and the employer elects to take action against the wrongdoer based on the findings of the report, the employer must disclose to the individual against whom an adverse action is to be taken a summary of the communications upon which it is based.[9] The summary must include the nature and substance of the communications. However, it does not need to include the identity of witnesses or other sources of information obtained through the investigation.[10] Furthermore, the employer is not required to provide the summary report until after an adverse action is taken and only if that action is based in whole or in part on the information received from the investigation.[11]

Since the interpretation of new legislation often occurs with subsequent opinion letters from the administrative agency that oversees the legislation, and court decisions, employers are encouraged to consult with counsel concerning workplace investigations. Input from counsel will be valuable with respect to the extent of the disclosure exclusions, the contents of the summary report, and general compliance with FACTA.

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[1] Fair and Accurate Credit Transactions Act of 2003, December 4, 2003.
[2] Consumer Credit Reporting Reform Act
[3] April 5, 1999 FTC opinion letter from Christopher W. Keller to Judi A. Vail.
[4] 15 U.S.C. Sec. 1681e.
[5] 15 U.S.C. Sec. 1681f.
[6] 15 U.S.C. Sec. 1681g.
[7] *Johnson v. Federal Express Corp.*, 147 F.Supp. 2d, 1268 (2001); *Hartman v. Lisle Park District*, 158 F.Supp. 2d, 869 (2001).
[8] 15 U.S.C. 1681a.
[9] Id.

[10] Id.
[11] Id.